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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1908

STEWART S. CORT, ET AL., *Petitioners,*

v.

RICHARD A. ASH.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America [hereinafter "Chamber"] respectfully requests leave from the Court to file a brief as *amicus curiae* pursuant to Rule 42.3 of the Rules of the Court. Counsel for the petitioners has consented to the filing of a brief *amicus curiae* by the Chamber; counsel for the respondent has declined consent.

This case involves the review of a decision by the United States Court of Appeals for the Third Circuit holding that a minority stockholder has an implied right of private action against corporate directors for alleged violations of § 610 of the Federal Election Campaign Act [hereinafter "Act"], 18 U.S.C. § 610 (1970) as amended 18 U.S.C. § 610 (Supp. II, 1972), a criminal statute prohibiting corporate campaign spending. *Ash* v. *Cort,* 496 F.2d 416 (3d Cir. 1974). The Third Circuit's decision reversed the district court's grant of summary judgment holding that no implied private right of action exists under § 610 of the Act. *Ash* v. *Cort,* 350 F. Supp. 227 (E.D. Pa. 1972) *denial of preliminary injunction affirmed,* 471 F.2d 811 (3rd Cir. 1973); *grant of summary judgment reversed,* 496 F.2d 416 (3d Cir. 1974).

The Chamber is a corporation organized and existing pursuant to the laws of the District of Columbia with principal offices at 1615 H Street, N.W., Washington, D.C. It represents over 47,000 businesses, 2700 local chambers of commerce, 42 state and regional chambers, 1000 trade and professional associations and 35 American chambers of commerce abroad. It has an underlying membership of over five million business firms and individuals.

Since its establishment in 1912, the Chamber has been deeply involved in activities concerning the business community and its role in the political process. In this regard the Chamber publishes a wide range of documents relating to public affairs including speeches, pamphlets and advertisements expressing business' view on governmental issues. The Chamber, as a corporation and as a representative of its member corporations, will be directly affected by the Court's decision.

The issues presented here affect the rights of corporate officials to make statements on behalf of a corporation and the right to distribute those statements. Thus, this case raises fundamental questions of the freedom of expression on public issues and the right of corporations to respond to false and misleading allegations made by political candidates.

Accordingly, the Chamber is vitally concerned with and would be immediately affected by a decision denying corporations the right to publish statements having only incidental, if any, impact on a particular candidate or political party.

In the opinion of Chamber and its members, questions are involved which must be afforded the broadest possible consideration. The critical questions of law upon which this case turns, and for which full deliberation is necessary are:

I. Can an implied private right of action be maintained under § 610 of the Federal Elections Campaign Act in the absence of any specific statutory provision or legislative intent indicating that such a right exists?

II. Is a corporation "actively electioneering" under § 610 of the Act, as construed by the relevant case law, when it attempts to refute the views of certain political candidates without naming those candidates and without declaring that a particular candidate or party should be elected or defeated?

III. If an implied private right of action exists and if the corporation's conduct is held to be within the scope of § 610, can the section withstand constitutional scrutiny under the First Amendment?

It is the opinion of the Chamber that the language of the Act compels, and its purpose will best be served by, a finding that the exclusive remedy under § 610 is criminal prosecution, and that statements published by a corporation which constitute expressions on public issues but do not refer to a particular candidate or political party are not within the scope of the Act.

Therefore, it is respectfully submitted that the Court grant leave for the filing of the attached brief by the Chamber of Commerce of the United States of America, as *amicus curiae,* in this case.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE*

The Chamber of Commerce of the United States of America [hereinafter "Chamber"] respectfully submits this brief as *amicus curiae* because the important questions involved will affect its and its members participation in free and open expression on public issues. Motion for leave to file this brief has been timely presented to the Court pursuant to Rule 42.3.

STATEMENT OF INTEREST

The Chamber is a nonprofit corporation organized and existing under the laws of the District of Columbia, with its principal office at 1615 H Street, N.W., Washington, D.C. 20062.

The Chamber represents more than 3700 state and local chambers of commerce and trade associations with underlying membership of over five million business firms and individuals. Direct business memberships number in excess of 47,000, a great majority of which are corporations subject to § 610 of the Federal Election Campaign Act, 18 U.S.C. § 610 (1972).

The interest of the Chamber and its members stems from the potential impact of this case on their ability to speak freely on issues of vital national concern. The Chamber and its members are involved in a wide range of activities, such as delivering speeches, publishing pamphlets and books, and conducting seminars, which directly involve the discussion of government affairs. Thus, one of the basic functions of the Chamber is to express the point of view of the business community on a wide range of national public affairs matters. Another basic function is to inform and educate its members, and others as to these matters. Additionally, its members many of whom are business corporations, have participated in the exchange of ideas concerning public issues through statements of opinion and disseminations of fact. Matters of public concern, because they are of importance, seldom escape ventilation in political election campaigns. To the extent that this case questions the right of corporations to be heard on public issues, it goes to the heart of both of the Chamber's own operations and those of its members.

This case, far more than its antecedents before the Court *e.g., United States v. Congress of Industrial Organizations,* 335 U.S. 106 (1948) and *United States v. United Auto Workers,* 352 U.S. 567 (1957), rehearing denied, 353 U.S. 943, involves the interplay of First Amendment rights with Congressional efforts to control undue influence in federal campaigns through § 610 of the Federal Election Campaign Act, 18 U.S.C. § 610 [hereinafter "Act"]. It does not involve corporate contributions to a candidate's campaign treasury or corporate admonitions to vote for, or against a candidate. The alleged violations, sought to be tested in an unprecedented private civil action, were a speech by the Chairman of Bethlehem Steel Corporation, Stewart S. Cort, and a subsequent advertisement summarizing that speech. Stockholders and the public were urged by Cort to participate in the 1972 presidential election by carefully weighing each candidate's position and, if necessary, correcting false and misleading statements made by any political candidate. Incidental to this basic message, the speech and advertisement responded to misstatements of facts by several *unnamed* and *unidentifiable* candidates as to whether corporations were paying their fair share of taxes. The nature of the response was the publication of data concerning the amount of taxes actually paid by Bethlehem.

The U.S. Court of Appeals for the Third Circuit held that a private civil action could be maintained under § 610 and that the District Court erred in granting summary judgment for the defendants. *Ash v. Cort,* 496 F.2d 416 (3d Cir. 1974). If the Court of Appeals' decision is affirmed, the effect on the entire business community, as well as on our political system, will be to severely limit the free and open discussion

of public issues. Carried to its logical denouncement the position announced by the Court of Appeals would cause a corporation to act at its peril each time it exercised its right to be heard on a public issue, even, as in the present case, if this exercise is occasioned by a need to defend itself against false charges. By the same token, corporations, including the Chamber would, under the Court of Appeals' rationale, act at their peril in attempting to provide informational or educational services respecting public affairs questions. A more comprehensive, more wide-reaching dampening of the free interchange of ideas essential to the resolution of public issues could scarcely be devised.

This danger would, moreover, be seriously aggravated by the Court of Appeals majority's holding that private civil actions may be maintained under the Act. As to any important governmental question there are invariably a minimum of two points of view. There could hardly be a more effective way for those opposed to a corporation's point of view than to stifle it by initiating civil actions for both damages and injunctive relief. In short, a particular chilling effect on free expression will result from the fact that, under the appellate court's holding, legal action could be generated not by any motive to enforce the Act but solely by a divergence of viewpoint.

As an organization which itself speaks out on public issues and is a major national representative of a large number of business corporations who do the same, the Chamber is deeply interested in the outcome of this litigation.

SUMMARY OF ARGUMENT

I.

The question presented is whether statements made by an officer of a corporation refuting generalized charges by unnamed candidates for public office are contributions or expenditures within the meaning of §§ 591(f)(1) and 610 of the Federal Election Campaign Act [hereinafter "Act"], 18 U.S.C. §§ 591(f)(1) & 610 for which an implied private action may be maintained. This case does not involve the donation of corporate funds to the campaign treasuries of candidates for federal office. Rather it turns on the question of whether a corporation, regardless of size, may make statements in its own defense responding to what it considers to be the false and misleading allegations made by unnamed candidates without being subjected to private suits by shareholders or others who may hold divergent views.

On June 12, 1972, the Chairman of the Bethlehem Steel Corporation, Stewart S. Cort, made a speech to the Rotary Club in Jacksonville, Florida entitled "Speak Out For Truth".[1] In the speech Cort urged his listeners to weigh the record of the candidates running for elective office, to correct false statements whenever made, and to mobilize "truth squads" to encourage responsible, honest and truthful campaigning. Cort made several references in his speech to the types of statements he had found to be misleading or false. The references included statements by presidential candidates that business was not paying its fair share of taxes and that the "White House" would listen

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[1]The Speech is reprinted in Petitioners' Petition for Certiorari as Appendix I at A51–60.

to corporate chairmen but not the working man. Petitioners' Brief for Certiorari at A52-53.

Cort's response to these statements was that while it was reasonable to demand that corporations pay their fair share of taxes, the statements implied that corporations were not already doing so. Cort disclosed that Bethlehem had paid over $200 million in taxes for 1971. Petitioners' Petition for Certiorari at A52-53. In concluding his speech Cort urged his audience to analyze the candidates and the issues, and to correct faulty, ill-founded or misleading statements. Petitioners' Petition for Certiorari at A59. Subsequently, an advertisement, summarizing the speech, was placed by the Public Affairs Department of Bethlehem in national periodicals, and national and local newspapers from August 22, 1972 until September 7, 1972.[2] The advertisement stated that copies of the full speech and a folder on how to organize truth squads could be obtained from the Public Affairs Department of Bethlehem.[3]

Richard A. Ash, as a minority stockholder brought an action in the District Court for the Eastern District of Pennsylvania asserting that the speech, advertisement and folder were campaign contributions and expenditures within the meaning of §§ 591(f)(1) and 610 of the Act, 18 U.S.C. §§ 591(f)(1) and 610. The gravaman of Ash's complaint was that Bethlehem had expended money to help secure the election of the Republican 1972 presidential candidate.

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[2]The advertisement appeared in Newsweek, Time, U.S. News & World Report, Business Week, Saturday Review, Industry Week, Forbes, Harvard Business Review, Editor & Publisher, The Washington Post, The Wall Street Journal and nineteen Bethlehem plant town newspapers. A copy of the advertisement is reprinted in Petitioners' Petition for Certiorari in Appendix H.

[3]Reprinted in Petitioners' Petition for Certiorari in Appendix J.

The District Court granted defendants motion to dismiss on the grounds that the court lacked jurisdiction, holding that no implied private right of action existed and that Cort's speech, which was ostensibly to mobilize and seek honest campaigns, was not within the coverage of § 610. *Ash v. Cort,* 350 F.2d 227 (1972). On appeal, the Third Circuit reversed the district court holding that an implied private right of action did exist for a minority stockholder under § 610 and further reversed the District Court's conclusion that the Cort speech did not on its face come within the purview of that section. *Ash v. Cort,* 496 F.2d 417 (3rd Cir. 1974).

The Federal Election Campaign Act in Title II, which includes § 610, provides criminal sanctions against corporations making expenditures which might unduly influence the nomination for election or the election of particular candidates or political parties in federal campaigns. In the two most recent reconsiderations of the Act, Congress failed to amend Title II to provide a private cause of action under § 610 but has provided for civil action under Title III. These recent enactments are a significant indication of Congressional intent since both have expressly been described as comprehensive overhauls of the Act. See text at 12-13, *infra.*

The Court has been confronted with an issue similar to that here presented in *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453 (1974), which held that an implied right of action was not available. The court applied the well-established principle of statutory construction that when legislation expressly provides a particular remedy in one part, but not in another part of the same Act, the Court will not expand the coverage of a statute to subsume other remedies. This principle is reflected in the maxim—*expressio unius est exclusio*

alterius. In the instant case this principle is particularly pertinent since Congress in enacting Title III, as compared with Title II, specifically provided for civil actions for violations of the reporting requirements of the Act. Thus, the Act prescribes a comprehensive statutory scheme, with criminal penalties the sole remedy for Title II violations, and civil remedies authorized under Title III. See text 13-21, *infra.*

II

Assuming arguendo that a private action may be maintained, still at issue would be whether § 610 of the Act prohibits a corporation from attempting, in self-defense, to refute false and misleading statements made by certain candidates without naming those candidates and without declaring that a particular candidate or party should be elected or defeated. The right of corporations to respond to misleading statements directed at them by a political candidate is necessary to assure full robust public debate. See text 21-23, *infra.* Moreover, since the Court has held that legal action is unavailable against false statements by public figures, absence malice, *New York Times v. Sullivan,* 376 U.S. 254(1964), the only recourse available to a corporation is to enter the public debate. See text 23, *infra.*

Furthermore, for an expenditure or contribution to be proscribed under § 610, it must be given to unduly influence the election of a particular candidate or party in a federal election. The district court held Bethlehem's conduct did not constitute "active electioneering" within the meaning of § 610. 350 F.2d 277, 232. The Third Circuit in remanding the case for a determination of whether Bethlehem's conduct was within the

coverage of § 610 apparently misconstrued the district court's decision since the district court had already made that determination. 496 F.2d 416, 424-426. The speech in this case, however, was not given to unduly influence any election. Its primary purpose was to admonish stockholders and the public-at-large to carefully analyze the candidates and issues, and only incidentally thereto did it state the positions on unnamed candidates relative to business. The nexus between undue influence of an election and the acts herein alleged to be a violation of § 610 does not exist in this case. See text 24-29, *infra.* If Cort's actions are within the scope of § 610 then every position on any issue, major or minor, taken by a corporation during an election would be subject to the proscriptions of § 610. The Second Circuit's pronouncement in *United States v. National Committee for Impeachment,* 469 F.2d 1135 (2d Cir. 1972) is directly relevant:

> Such a result would, we think, be abhorent; the Government [or Ash in this case] fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon Society chapter would be a "political committee," for "environment" is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat "juvenile delinquency" or a Golden Age Club promoting "senior citizens' rights" would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable.
> 469 F.2d at 1142.

III.

If the Third Circuit decision is upheld, § 610 as applied by that court would be an unconstitutional infringement of First Amendment rights. Statutes which restrict free speech, similar to § 610, are presumed to be unconstitutional unless the statute narrowly defines the evil to be curbed with specificity. To hold that § 610 authorizes a private action to challenge speech which merely responds to allegations made by a political candidate is to broaden the coverage of § 610 beyond the limits necessary to control undue influence by corporations on federal elections. See text 29-31, *infra*.

Furthermore the creation of an implied private action would have a chilling effect on the right of free speech by corporate officers. Private actions, even if unsuccessful, would theaten the very ability of corporate officials to speek freely on any issue. The Chamber believes that § 610 as applied by the Third Circuit would force business to remain silent during primary or general elections for fear that any comments might be interpreted by even a few as having some influence on a political candidate or party. The criminal remedy provided in § 610 is sufficient to curb the evil against which the Section is aimed without unduly restraining free speech. The Chamber and its members will effectively be denied their First Amendment rights to engage in the unfettered and robust public debate if the Third Circuit's decision, implying a private right of action, is upheld. See text 31-38, *infra*.

I. An Implied Private Right Of Action Cannot Be Maintained Under Section 610 Of The Federal Election Campaign Act In The Absence Of Any Specific Statutory Provision Or Legislative Intent Indicating That Such A Right Is Created.

The pivotal issues in this case are whether an implied private right of action exists under the criminal provisions of 18 U.S.C. § 610 as amended by the Federal Election Campaign Act of 1971 [4], and whether such an

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[4] 18 U.S.C. §610 provides:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive contribution prohibited by this section.
>
> Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
>
> For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.
>
> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services,

[Footnote continued on next page]

action can be maintained to restrain free expression by corporate executives on matters of public concern.

The history of the criminal sanctions against corporate expenditures in federal elections spans the twentieth century.[5] Directly relevant here Congress, in 1972 enacted a comprehensive statutory scheme codifying the previously existing criminal statutes.

In codifying and enlarging upon the criminal provisions Congress in Title II of the Act, which includes § 610, provided only for criminal sanctions. By contrast, Title III of the Act authorizes the Attorney General of the United States to bring *civil* actions to en-

or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) *to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section;* but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment, or by monies obtained in any commercial transaction. [emphasis supplied].

[5] The history of the federal controls on corporate campaign spending was traced in detail by Mr. Justice Frankfurter in United States v. United Automobile Workers, 352 U.S. 567, 570-584 (1957).

force that title's reporting requirements. 2 U.S.C. § 438(d)(1)(1972).[6]

The Court has considered similar statutory frameworks and has concluded that a private cause of action could not be implied. *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers,* 414 U.S. 453 (1974) [hereinafter *"Amtrack"*]; *T.I.M.E. Inc.* v. *United States,* 359 U.S. 464 (1959); and *Botany Worsted Mills* v. *United States,* 278 U.S. 282 (1929).

In *Amtrak,* the Court held that to imply a private right of action would undercut the very purpose of the Rail Passenger Service Act of 1970, 45 U.S.C. § 501 *et seq.* (1970). The holding was based on an examination of the relevant section of the Rail Passenger Service Act, general principles of statutory construc-

[6] The relevant sections of Title III of the Federal Election Campaign Act provide:

> Any person who believes a violation of this title has occurred may file a complaint with the supervisory officer. If the supervisory officer determines there is substantial reason to believe such a violation has occurred, he shall expeditiously make an investigation, which shall also include an investigation of reports and statements filed by the complainant if he is a candidate, of the matter complained of. Whenever in the judgment of the supervisory officer, after affording due notice and an opportunity for a hearing, any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this title or any regulation or order issued thereunder, the Attorney General on behalf of the United States shall institute a civil action for relief, including a permanent or temporary injunction, restraining order or any other appropriate order in the district court of the United States for the district in which the person is found, resides or transacts business upon a proper showing that such person has engaged or is about to engage in such acts or practices, a permanent or temporary injunction, restraining order, or other order shall be granted without bond by such court. 2 U.S.C. § 438(d)(1) (1974).

tion, and the legislative history, which supported a conclusion that the Act vested exclusive authority in the Attorney General (except in cases involving labor agreements) for the enforcement of its provisions.

Similarly the legislative history of the Federal Election Campaign Act supports the conclusion that Congress intended the criminal remedies under § 610 to be *exclusive*. Although § 610 was amended in 1972 to expand the definition of political expenditures and contributions, Congress did not expand the coverage to authorize civil causes of action. See, S. Rept. No. 92-96, 92d Cong., 1st Sess. (1971); 1972 U.S. Code Cong. & Admin. News, 1773.

Lower court cases are consistent with the principles denying an implied private right of action and at odds with the Third Circuit majority's holding. For example, in *Holloway* v. *Bristol-Meyer Corp.*, 485 F.2d 986 (D.C. Cir. 1973), the court of appeals upheld the district court's holding that the Federal Trade Commission Act, 15 U.S.C. §§ 45, 52 and 54 did not created a private right of action.[7] The court was

[7] *See also,* Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83 (7th Cir. 1962) denying a private suit by a mayoral candidate for compensatory and exemplary damages resulting from a radio station's violation of the "equal time" provisions of the Act. *But see,* Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) where the Court held that when constitutional rights are infringed upon, such as Fourth Amendment rights it will be more willing to imply a private right to protect those constitutional rights. Application of Bivens, *supra,* in this case would require an analysis and balancing of constitutional issues which is inapplicable here since Ash is not claiming his cause of action arises under the Constitution. In point of fact, this case involves the converse of Bivens since to imply a private right here would raise serious questions concerning Cort's and Bethlehem's First Amendment rights. See text at 29-33, *infra.*

guided by the legislative history of the Act which provided for government enforcement as the exclusive remedy.

Reversal of the Third Circuit's construction of § 610 is further mandated by the principle of statutory construction, announced by the Court in *Amtrack, supra,* 414 U.S. at 458. That principle holds that when legislation expressly provides a particular remedy, courts should not expand the coverage of the statute to subsume other remedies, particularly where another title or section of an Act specifically provides the remedy in question for a separate and distinct offense. The reasoning of Judge Aldisert, in his dissent to the Third Circuit's decision, tracks that principle. Judge Aldisert concluded:

> A legislative schema [sic] expressly providing for a private remedy in one title of the Act and not in another title would call into play the familiar "principle of statutory construction [reflecting] an ancient maxim—*expressio unius est exclusio alterius.*" *Ash* v. *Cort,* 496 F.2d 416, 428 (3rd Cir. 1974).

See also, *Calhoon* v. *Harvey,* 359 U.S. 464 (1959); *Fleishman Distilling Corp.* v. *Maier Brewing Co.,* 386 U.S. 714, 720 (1967); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951); *Switchmen's Union of North America* v. *National Mediation Board,* 320 U.S. 297, 301 (1943).

The Third Circuit relied upon two major arguments to support an implied private right of action against Bethlehem. The Chamber believes both are inapposite. The first ground relied upon by the Third Circuit rested upon Mr. Justice Clark's opinion in *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 431-432 (1964) wherein an implied civil remedy was read into the criminal sections of the Securities Exchange Act even though the remedy was not expressly provided for by Congress. The second ground erroneously relied upon by the Third Circuit was that stockholders were expressly intended by Congress to be afforded a cause of action. This assertion takes as its precedent Mr. Justice Rutledge's concurring opinion in *United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 134-135 (1948) wherein he declared that one of the Federal Election Campaign Act's purposes was "... to protect union members holding political views contrary to those supported by the union from use of funds contributed by them to promote acceptance of those opposing views". 335 U.S. at 134.

In *J. I. Case Co.* v. *Borak, supra,* the Court was confronted with a stockholder's derivative suit charging deprivation of pre-emptive rights and breach of the directors' fiduciary duty resulting from violations of § 14(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 74n(a). 377 U.S. at 427. In holding that an implied private cause of action exists under the Securities & Exchange Act of 1934, the Court was aided by § 27 of the Securities Act which, unlike any section relevant to § 610, granted the district courts

general equity jurisdiction to enforce that Act.[8] Mr. Justice Clark concluded:

> It appears clear that private parties have a right under § 27 to bring suit for violation of § 14(a) of the Act. *Indeed, this section specifically grants the appropriate District Courts jurisdiction over all suits in equity and actions at law brought to enforce any liability or duty created under the Act.* 377 U.S. at 430-431. [Emphasis supplied].

The court was further persuaded that a private right of action existed because § 14(a) of the Securities Exchange Act of 1934 expressly delegated to the Securities and Exchange Commission the authority to promulgate regulations to protect investors. Justice Clark declared:

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[8] Section 27 of the Securities and Exchange Act of 1934 provides:

> The district courts of the United States, and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this chapter or the rules and regulations thereunder and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 225 and 347 of Title 28. No costs shall be assessed for or against the Commission in any proceeding under this chapter brought by or against it in the Supreme Court or such other courts. 15 U.S.C. § 78aa (1974).

> These broad remedial purposes are evidenced in the language of the section which makes it "unlawful for any person . . . to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security . . . registered on any national securities exchange in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest *or for the protection of investors*". [Emphasis supplied by the Court]. While this language makes no specific reference to a private right of action, among its chief purposes is "the protection of investors", which certainly implies the availability of judicial relief where necessary to achieve that result. 377 U.S. at 431-432.

The rationale of *J. I. Case* v. *Borak, supra,* is plainly distinguishable from the instant case since § 610 of the Federal Election Campaign Act does not grant to the district courts jurisdiction over suits in equity or at law to enforce its provisions.

The Third Circuit's second ground for supporting an implied private right of action relates to language in Mr. Justice Rutledge's decision in *United States* v. *CIO, supra,* to the effect that one of the purposes of the Act was the protection of minority union members from being coerced to contribute to a candidate or party against their wishes. At least two important reasons militate against reading Mr. Justice Rutledge's concurring opinion in *United States* v. *CIO, supra,* as creating a private right of action in corporate shareholders. First in *United States* v. *United Auto Workers, supra,* the Court after considering the objectives of the Act as articulated by Mr. Justice Rutledge, chose the objective of preventing of undue influence rather than protecting minority views as the

primary consideration upon which violations of the Act were to be judged. 352 U.S. at 588-89.

Second, consideration of corporate expenditures has been the subject of Congressional enactments since 1907. Throughout this period, Congress has had ample opportunity to create a private right of action or at least enact provisions similar to § 27 of the Securities Exchange Act of 1934. It is significant to note that in both the consideration of the Federal Election Campaign Act of 1971 and the Federal Election Campaign Act Amendments of 1974, Pub. L. 93-443, 93d Cong., 2d Sess. (1974), Congress has amended the criminal provisions but has neither acted nor commented on private rights of action.

In commenting on the purpose of the 1974 Amendments, the Senate Report states:

> This recommended legislation is a comprehensive and far-reaching measure, designed to bring together various laws already enacted or passed by the Senate, for the purpose of providing complete control over and disclosure of campaign contributions and expenditures in campaigns for Federal elective office, including all public funds which any candidate may be entitled to receive prior to and after the date of any election. S. Rep. No. 93-689, 93rd Cong., 2d Sess. 1 (1974).

The net effect of implying a private right of action would be to judicially expand § 610's coverage in areas where Congress with ample opportunity has failed to legislate for over sixty years. Such a broadening of § 610 would permit every dissident stockholder to challenge the corporation whenever it speaks out on public issues during an election. The resulting chilling effect on free speech would force corporations to limit and

censor all statements on public affair issues or risk private penalties. Moreover, the multiplicity of suits which would arise would subject corporate directors to constant harassment and would require them to account for each exercise of speech involving governmental affairs. In our complex political system where government and business are by necessity so closely related, every public statement would be open to challenge if the Third Circuit is upheld.

The chilling effect on the exercise of these constitutionally protected rights is strikingly lessened if under § 610, penalties are assessed in actions initiated by government prosecutors rather than individuals who may find themselves in disagreement with a particular corporate expression.

Criminal sanctions, as the exclusive means of enforcing § 610, permits free expression by corporate executives while effectively curbing the corruption of federal elections by contributions or expenditures. Criminal sanctions, centrally enforced by the Department of Justice, fosters the development of a uniform enforcement policy, thus giving corporate executives reasonable notice of what is and is not within § 610's coverage. To permit private actions on the other hand, would cause the diffusion of standards. While this result may be a characteristic of civil litigation in general, where First Amendment rights are involved, certainty of the Act's scope is absolutely necessary if free speech is to be protected.

When the benefits of an implied private right of action are balanced against the chilling effect on First Amendment rights, the Court must refuse to imply a private right under § 610. If a private right of action

is created by the Court, then the question arises as to how any meaningful line can be drawn which protects First Amendment rights. The Chamber believes the answer is that no such line can be drawn since the mere creation of a private right alone will immediately threaten free speech by corporate executives.

II. A Corporation Is Not "Actively Electioneering" Under The Act, As Construed By The Relevant Case Law, When It Defends Itself Against Charges By Refuting Candidates Statements Without Naming Those Candidates And Without Declaring That A Particular Candidate Or Party Should Be Elected Or Defeated.

Assuming Cort's activities were questioned in the proper proceeding, it would be necessary to determine whether a corporation may reply in self-defense, to false and misleading statements made by political candidates in federal elections without violating § 610 of the Act. At the outset a fundamental distinction must be drawn between acts which unduly influence the election of a particular candidate from acts which seek to correct misleading or false statements having at most only an incidental, if any, impact on particular candidates.

Cort's speech had two major purposes: (1) to encourage non-partisan participation in the elective process, and (2) to respond to erroneous statements made against corporations. The first purpose, encouraging non-partisan participation, is clearly not within the scope of § 610. See, *United States* v. *CIO, supra; United States* v. *United Auto Workers, supra; United States* v. *Lewis Foods,* 366 F.2d 710 (9th Cir. 1966) reversing 236 F.Supp. 849 (S.D. Cal. 1964), on remand from 381 U.S. 908 (1965); and *United States* v. *National Committee for Impeachment* 469 F.2d 1135 (2d

Cir. 1972). Thus, the only action of Bethlehem's which is even arguably within the scope of the Act is Cort's brief response to allegations by unnamed candidates that corporations, such as Bethlehem, were not paying their fair share of taxes.

The right of a corporation to respond to what it believes are misleading statements by a political candidates is one of first impression for the Court. None of the cases which have analyzed § 610 have confronted a situation in which a corporation has been forced to defend itself against allegations that it was operating in a manner detrimental to the public good. The legislative history is devoid of any discussion on this subject.

The Court's rationale in upholding the basic right to respond in other areas involving political campaigns is however instructive on the issue of whether a corporation has the right to respond under § 610.

The right to respond *to issues* raised in a campaign was considered by this court in *Mills* v. *Alabama,* 384 U.S. 214 (2966), wherein an Alabama statute prohibiting the publication of editorials on election day was struck down as violative of the constitutional protection of free speech and press. While *Mills* involves the freedom of press, it has a direct bearing on the instant case. Cf., *Red Lion Broadcasting* v. *Federal Communications Commission,* 395 U.S. 367 (1969) establishing the right to reply in the television medium under the "fairness doctrine".

Similarly, the Court in *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964) permitted the publication of an advertisement responding to allegations that certain undesirable conditions existed in Montgomery, Alabama. In enunciating the rule that public figures shall not be subject to libel actions, except where actual malice is shown, 376 U.S. at 283, the Court held:

> That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need * * * to survive," N.A.A.C.P. v. Button, 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405, was also recognized by the Court of Appeals for the District of Columbia Circuit in Sweeney v. Patterson, 76 U.S.App. D.C. 23, 24, 128 F.2d 457, 458 (1942), cert. denied, 317 U.S. 678, 63 S.Ct. 160, 87 L.Ed. 544.

Since a publicly held corporation is in essence a "public figure," and, since absent malice a tort action is not available, Bethlehem's sole recourse against misleading statements by a political candidate is to enter the debate. As the Court in *New York Times* v. *Sullivan* announced:

> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehemently sharp attacks on governmental officials. 376 U.S. at 270.

Must a corporation stand idly by, muted from making any responses whatsoever to what it feels are misleading and false statements or can it enter the public debate? Surely if sharp attacks on governmental officials are protected under *New York Times* v. *Sullivan, supra,* then under the same rationale generic statements by a corporate officer on economic issues must also be protected under that same rationale.

The only remaining question is whether or not the corporate statement was made to unduly influence the election or whether it was merely participation in the free exchange of ideas. In this case there can be no doubt that Cort's speech and the advertisement summarized that speech were, on their face, in the latter category. Candidiates to whom statements were attributed by Cort were neither named nor were any identifying statements attached. This type of participation in debate is far removed from the type of activity covered by § 610 which only proscribes "active electioneering" on behalf of a particular candidate. *United States* v. *Auto Workers, supra.*

In discussing the application of § 304 of the Taft-Hartley Act, which was later codified into 18 U.S.C. § 610, Senator Taft stated that the Act proscribed those contributions or expenditures which were made to a particular candidate. Senator Taft stated in the Congressional debates:

> [I]n each case the question is whether or not a union or a corporation is making a contribution or expenditure to elect A as against B. 93 Cong. Red. 6439-6440, reported in 352 U.S. at 587, n. 1.

Furthermore, the cases construing § 610 hold that a contribution or expenditure is outside the scope of the section's prohibition if it is made for activites not considered "active electioneering". *United States* v. *United Auto Workers, supra; United States* v. *Lewis Food Company, Inc., supra; United States* v. *Anchorage Central Labor Council,* 193 F.Supp. 504, 507 (D. Alaska 1961); *United States* v. *The National Committee for Impeachment, supra.* In *United States* v. *Auto-*

workers, supra, the Court held that only corporate and union expenditures for particular candidates or political parties were proscribed by § 610. Mr. Justice Frankfurter, for the court, declared:

> The evil at which Congress has struck in § 313 [forerunner to § 610] is the use of corporation or union funds to influence the public at large to vote *for a particular candidate or particular party.* 352 U.S. at 589. [Emphasis supplied]

Lower courts in examining the scope of § 610 have taken as their pivotal concern the question posed by Justice Frankfurter in *United Auto Workers, supra:* "Did it [the questioned activity] constitute active electioneering or simply state the record of particular candidates on economic issues?" 352 U.S. at 592.

In *United States* v. *Lewis Food Company, Inc.,* supra, the district court applied the "active electioneering" test to find that a corporate advertisement setting forth the records of federal and state candidates on "votes cast in favor of constitutional principles" fell in the same category as publishing candidates' records on economic issues, which *United States* v. *United Auto Workers* found permissible. The advertisement found to be outside the scope of § 610 in *United States* v. *Lewis Foods, supra,* was carried in thirty-five newspapers throughout the state of California. In dismissing the indictment the court held:

> . . . [A]n expenditure by a labor union [or corporation] does not come within the purview of the statute if it is not for an activity which constitutes active electioneering but is merely for a publication which simply states the record of particular candidates on economic issues.
> . . . .

> The Court is of the view that the voting record of said candidates "in favor of constitutional principles" is in the same category as the records of candidates on economic issues. The advertisement does not constitute active electioneering. It merely states the voting records of said candidates "in favor of constitutional principles." Obviously, it was not an attempt to control the election. 236 F. Supp. at 853.

The Ninth Circuit, after remand by the Supreme Court, 381 U.S. 908 (1965), did not take issue with the district court's determination that an expenditure did not come within the Act's purview if it was not for "active electioneering". 366 F.2d 710, 712.

Similarly the "active electioneering" test was applied in *United States* v. *The National Committee for Impeachment, supra,* to an advertisement calling for the impeachment of President Nixon because of his Vietnam policy. The advertisement which carried a list of members of Congress supporting such impeachment,was found by the Court to be permissible under § 610. The advertisement in *National Committee* contained the following statement:

> The National Committee for Impeachment will devote its resources in funds and publicity in aid of any new candidate for election to the House of Representatives or re-election of an incumbent Member, whether in a primary contest or the actual election contest, whether Republican, Democrat, Independent or a new party, in the order in which their names are officially printed in the Congressional Record. 469 F.2d at 1138.

The court held that since the "major purpose" of the advertisement was the impeachment of the President and not the nomination or election of candidates, the

expenditure did not violate § 610 of the Act. 469 F.2d at 1141-1142. See also, *United States* v. *Painters Union,* 172 F.2d 854 (2d Cir. 1949); *United States* v. *Anchorage Central Labor Council, supra.* Application of the "major purposes" test enunciated in *National Committee, supra,* to this case would result in the speech and advertisement being held clearly outside the ambit of § 610. The major purpose of the questioned material was the encouragement of non-partisan involvement in an election; not the endorsement of a particular candidate or party.

More importantly the court in *National Committee* recognized the intolerable consequences which would result if it held that the Committee's advertisement was within the perview of the Act:

> We dispose more readily of the Government's suggestion that the Act applies to the National Committee because—quoting from the affidavit supporting its motion for a preliminary injunction—"with respect to the upcoming election for President and Vice-President of the United States, the National Committee derogates President Nixon's stand on a principal campaign issue—the Vietnam war." On this basis every position on any issue, major or minor, taken by anyone would be a campaign issue and any comment upon it in, say, a newspaper editorial or an advertisement would be subject to proscription unless the registration and disclosure regulations of the Act in question were complied with. Such a result would, we think, be abhorrent; the Government fails to point to a shred of evidence in the legislative history of the Act that would tend to indicate Congress meant to go so far. Any organization would be wary of expressing any viewpoint lest under the Act it be required to register, file reports, disclose its contributors, or the like. On the Government's thesis every little Audubon

> Society chapter would be a "political committee," for "environment" is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat "juvenile delinquency" or a Golden Age Club promoting "senior citizens' rights" would fall under the Act. The dampening effect on first amendment rights and the potential for arbitrary administrative action that would result from such a situation would be intolerable. 469 F.2d 1135, 1142. [citations omitted].

In enacting the Federal Election Campaign Act of 1971, Congress merely codified the judicial construction previously given to § 610 by expressly recognizing that the touchstone is whether the funds are used for active electioneering. 117 Cong. Rec. H11477 (Nov. 30, 1971) (remarks by Congresman Hansen). See also, *Pipefitters Local 562* v. *United States,* 407 U.S. 385, 411-412 (1972).

Thus, there are two criteria for determining whether an advertisement is within the scope of § 610:

> First, was the expenditure for the purpose of influencing the public-at-large to nominate for election or elect a particular candidate or particular party. *United Auto Workers, Supra,* at 589.
>
> Second, was the expenditure or contribution made *on behalf* of or *to* a candidate, campaign committee or political party or organization.[9]

In each of the foregoing cases the conduct which the Court held not violative of § 610 more resembled "active electioneering" than does Cort's speech. In the instant case no candidate was named. No candidate's record was cited, even though under *United States* v. *United Auto Workers, supra,* such would be permissible. In fact the major purpose of the speech was a nonpartisan appeal for stockholders in particular and other voters in general to examine the record of all candidates. Only incidental to this major purpose did Cort refer to allegations by unnamed candidates regarding statements which he felt were untrue. Moreover, the speech and advertisement were not made on behalf of any particular candidate or organization. There is no indication in the record that any direct or indirect expenditure was made to a candidate or political party. Bethlehem's sole objective was to participate in the deliberation of public issues. Bethlehem's actions foster the ends which the Court in *New York Times* v. *Sullivan, supra,* found protected by the First Amendment. Thus, under the "major purpose" doctrine developed by the courts and supported by the Act's legislative history, it is clear that Bethlehem's actions were not within the purview of § 610.

[9] *See* note 4 *supra* at para. 4.

III. As Applied By The Third Circuit § 610 Of The Federal Elections Campaign Act Is Unconstitutional Under the First Amendment.

A determination of the constitutionality of § 610 becomes necessary if the Court finds that a private right of action can be maintained under the facts of this case. In *United States* v. *CIO, supra* and *United States* v. *Auto Workers, supra,* the Court has expressed gave doubts on the constitutionality of § 610.

Mr. Justice Rutledge correctly identified the constitutional issue in his concurring opinion in *United States* v. *CIO:*

> We are concerned in this case with the constitutionality of § 313 [predecessor to § 610] as

amended only insofar as it may be applied in restriction or abridgment of the rights of freedom of speech, press and assembly secured by the First Amendment. Other applications are not in question. There can be little doubt of Congress' power to regulate the making of political contributions and expenditures by labor unions, as well as by other organizations and individuals, in the interest of free and pure elections and the prevention of official corruption, by apropriate measures not trenching on those basic rights. But when regulation or prohibition touches them, this Court is duty bound to examine the restrictions and to decide in its own independent judgment whether they are abridged within the Amendment's meaning. 335 U.S. at 139-140.

A statute restricting First Amendment freedoms must be narrowly construed to meet the precise evil Congress sought to curb. *United States* v. *Harriss,* 347 U.S. 612 (1954); *United States* v. *Rumely,* 345 U.S. 41 (1953); *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Thornhill* v. *Alabama,* 310 U.S. 88 (1940); *Schneider* v. *State,* 308 U.S. 147 (1939); *DeJonge* v. *Oregon,* 299 U.S. 353 (1937). The Court in *United States* v. *Harriss, supra,* confronted similar issues in construing the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261-270. The Court held that the Lobbying Act to avoid constitutional infirmity must be narrowly construed to cover only those cases where the alleged violation has as a main purpose the actual influence of a Member of Congress.

Furthermore, the Court has established a presumption against the constitutionality of legislation limiting freedom of speech, press and assembly guaranteed by the First Amendment. *Thomas* v. *Collins,* 323 U.S.

516 (1945); *Thornhill* v. *Alabama, supra; Schneider* v. *State, supra.*

Resolution of the issue of the constitutionality of § 610 requires a balancing of the evil to be curbed, (undue influence exerted on the elective process through expenditures and contributions by corporations to or on behalf of particular candidates or parties) against the possible infringement of the constitutional rights of free speech. *United States* v. *CIO, supra,* at 146. *Wisconsin* v. *Yoder,* 405 U.S. 205, 215 (1972); *Roth* v. *United States,* 354 U.S. 476 (1957); *Stromberg* v. *California,* 283 U.S. 359 (1931); *N.A.A.C.P.* v. *Button,* 371 U.S. 415 (1963).

Cort's speech and the subsequent advertisement had as their primary purpose the encouragement of nonpartisan participation in the electoral process. Incidental to this purpose, Cort briefly responded to several generalized charges made against business. If corporate dissemination of this speech is unprotected by the First Amendment, then the delicate balance has been tipped—§ 610 no longer narrowly defines those evils which Congress sought to control. If § 610 is held to cover Cort's speech and the advertisement, then the attempted proscription would subsume constitutional rights of free speech. Fundamental to the free exchange of political thought is the right to speak out without the threat of legal restraints, governmental or private.

To permit a minority stockholder to maintain an implied private action in this case would be to put every corporate executive and every corporate member of the Chamber under the constant threat that individuals who oppose their views could commence

private suits. At a minimum this threat and possible harassment would dampen corporate willingness to participate in public debate. The mere possibility that a speech or advertisement of only incidental influence on a political campaign could create civil liability, both for damages and injunctive relief, on the part of corporate executives would effectively silence the voice of business on all issues. Attempted invocation of prior restraints to silence a corporate officer is amply demonstrated by Ash's attempt to secure a preliminary injunction against the distribution of Cort's speech and the advertisement prior to the 1972 presidential election. *Ash* v. *Cort,* 350 F.Supp. 227 (E. D. Pa. 1972) *denial of preliminary injunction affirmed* 471 F.2d 811 (3rd Cir. 1973). While the district court and court of appeals denied preliminary injunctions in this case, the threat exists that other courts under similar circumstances might issue such injunctive relief which the Court has held would constitute an unconstitutional prior restraint of speech. *New York Times* v. *United States,* 403 U.S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, 419 (1971); *Bantam Books, Inc.* v. *Sullivan,* 372 U.S. 58, 70 (1963). As Mr. Justice Brennan announced in *New York Times* v. *United States, supra,* only in extraordinary circumstances will the Court sustain a prior restraint of speech. In denying the government request for injunctive relief, Mr. Justice Brennan defined the extraordinary exception as the ". . . single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden. Our cases have thus far indicated that such cases may arise only when the nation is at war . . . ." 403 U.S. at 726.

In the final analysis, the possibility that published statements, which do not have as their principal purpose the undue influence of an election may give rise to private causes of action has a chilling effect upon free speech. *New York Times* v. *United States, supra; Dombrowski* v. *Pfister,* 380 U.S. 479, 494 (1965); but see, *Laird* v. *Tulun,* 408 U.S. 1 (1972). See also. Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844, 852-858 (1970).

It is the opinion of the Chamber that § 610 as applied by the Third Circuit will effectively prevent the business community from speaking out on important public issues . In today's world, the discussion of every issue involving a corporation touches in some way the political process. To expand the scope of § 610, by implying a private right of action, will open the floodgates to a multiplicity of suits, which even if unsuccessful, would threaten the very ability of corporate officials to speak freelly and openly on important issues. Such an expansion of § 610 is contrary to what the Court in *New York Times* v. *Sullivan* found to the ". . . profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open". 376 U.S. at 270-271.

CONCLUSION

For the foregoing reasons, the decision of the United States Court of Appeals for the Third Circuit should be reversed.

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